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No. 581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

On Writ of Certiorari to the Supreme Court of Ohio

WILLIAM W. BURNS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The brief for the petitioner correctly cites the opinions below.

JURISDICTION

Matters of jurisdiction are adequately set forth in the brief for the petitioner.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Respondent includes herein additional sections of the Revised Code of Ohio, (Appendix A, p. 11), and a section of the Revised Statutes of Illinois (Appendix B, p. 15),

supplemental to the relevant sections of the Constitution of the United States and of the State of Ohio, of the Revised Code of Ohio, and of the rules of practice of the Supreme Court of Ohio, set out in the brief of petitioner.

QUESTION PRESENTED

Respondent accepts the statement of questions presented as set out in brief for the petitioner.

STATEMENT

The statement appearing in brief for the petitioner is augmented as follows in order that this Court may have before it the full picture:

The defendant, William Burns, has had six indictments returned against him by the grand jury of Hamilton County, Ohio. He pleaded not guilty to all of these indictments at the time of arraignment. William Burns was subsequently tried by jury in the Court of Common Pleas on one of these six indictments which charged in the first count the crime of burglarly of an inhabited dwelling and in the second count the crime of grand larceny. After a nine day trial the jury returned a verdict of guilty of the first count of burglary of an inhabited dwelling without a recommendation of mercy and also returned a verdict of guilty of the second count of grand larceny.

William Burns duly filed a motion for a new trial which motion upon hearing was overruled and final judgment was entered against William Burns. The defendant immediately filed and perfected his appeal to the Court of Appeals, First District, and was supplied with a transcript of the proceedings in the Court of Common Pleas. In the

appellate hearing before the Court of Appeals, William Burns was represented by counsel and a brief was filed in his behalf. The First District Court of Appeals after having heard arguments of counsel and after examination of the written transcript of the record of the proceedings in the Court below and upon due consideration found that there was no error in the trial proceedings and therefore affirmed the judgment of the trial court on August 26, 1953.

On the day the Court of Appeals rendered its judgment, William Burns filed notice of appeal with the clerk of the court, but did not pursue his appeal to the Supreme Court of Ohio on the merits.

In 1955, William Burns filed an application for a writ of habeas corpus in the Common Pleas Court of Franklin County, Ohio, and on March 23, 1955, filed a motion in the Court of Common Pleas of Hamilton County, Ohio, to certify the record of the trial proceedings to the Franklin County Court.

In July, 1957, William Burns filed a motion for dismissal of the outstanding and pending indictments against him in the Hamilton County Court of Common Pleas. This motion was heard and overruled by the Court.

In December, 1957, William Burns mailed certain papers to the clerk of the Supreme Court of Ohio. These papers included a motion for leave to proceed *in forma pauperis* with supporting affidavit, motion for leave to appeal, and a copy of a notice of appeal filed in the Court of Appeals. No copy of the notice of appeal was served on the prosecuting attorney of Hamilton County as required by law. The clerk of the Supreme Court returned the papers to William Burns with a letter which is the basis of this proceeding.

In January, 1958, Burns filed in the Court of Common Pleas, Hamilton County, Ohio, an application for a writ

of habeas corpus and also a motion to quash the outstanding indictments against him. Briefs were filed by both parties and hearing was had by the Court and after due consideration the Court overruled the motion and denied the writ of habeas corpus.

In March, 1958, William Burns filed a petition for a writ of mandamus in the Federal District Court in which he prayed that the outstanding indictments against him be quashed.

In October, 1958, William Burns, filed in the Court of Appeals, First Appellate District, a petition for a writ of mandamus in which William Burns prayed that the outstanding indictments against him be quashed.

In the Supreme Court of the United States certiorari was granted on December 15, 1958, and on January 26, 1959, a grant was modified to limit the question on certiorari.

SUMMARY OF ARGUMENT

1. Petitioner was afforded a transcript of the proceedings in the trial court and an adequate review of those proceedings on appeal. Successive appellate reviews are not a right under the Constitution of the United States.

2. The equal protection of the laws clause of the Fourteenth Amendment to the Constitution does not apply in this case. The same rule applying to the petitioner applies to all others seeking a review in the Supreme Court of Ohio.

ARGUMENT

Petitioner Was Not Denied a Review of his Conviction on Appeal.

This case is not one in which a convicted defendant in a felony case is denied on appellate review of the trial court's proceedings. Such appellate review is available in Ohio to every convicted felon and may be prosecuted *in forma pauperis.*

William Burns, the petitioner, was not only afforded such right of appeal, but availed himself of it. His conviction was thoroughly reviewed on appeal and without cost to him. The courts in the Ohio judicial system affording such appellate review are the ten, three-judge, District Courts of Appeal. On appeal of a criminal case not only may the appellant proceed *in forma pauperis*, but the state may furnish him without cost a transcript of the proceedings in the trial court.[1] Section 2301.23 to 2301.25, Revised Code (App. A. p. 11). If an appeal is taken by the prosecution, the trial court may even appoint a competent attorney to argue the bill of exceptions against the prosecuting attorney or the attorney general, and pay his fee out of the public treasury. Section 2945.69, Revised Code (App. A, p. 13).

What petitioner now wants is not a review on appeal—that he has had—but a second review, or a review of the review—in the Supreme Court of Ohio. Whereas he had the right and exercised his right to appellate review in the Court of Appeals, he had no right to a further review in

1. It is true that in State v. Truzo, 75 O.L.A. 187, an Ohio Court of Appeals held that the furnishing of a free transcript is discretionary with the trial court, but the common practice is to furnish it in case of appeal. The appellate court may order a more complete transcript. (Sec. 2953.04, Revised Code, App. A., p. 13).

the Supreme Court of Ohio. Appeal as a matter of right to the Supreme Court of Ohio is limited to a very narrow field of cases. All others are discretionary with the court and upon terms fixed by the court, one of which conditions is the payment of the minimal docket fee of $20.00.[2]

It is here that the Ohio procedure differs from the Illinois procedure and distinguishes the instant case from the case of *Griffin v. Illinois*, 351 U. S. 12, most relied on by petitioner. Under the Illinois Criminal Code all appeals in felony cases are taken directly from the trial court to the Supreme Court (Ill. Rev. St. Ch. 38, Sec. 780½—Appendix B, p. 15). *Griffin* could not appeal unless he had a transcript. He had no money to procure a transcript and the court refused to furnish him one free. Accordingly, his indigency precluded him having an appeal.[3] We emphasize the article "an". It indicates one—not more than one.

In this instant case, Burns, the petitioner, had a transcript, and had his appeal. He was denied neither because of his poverty. The holding in *Griffin* was fully complied with. What he now complains of is that, because he could not comply with the rules of the Ohio Supreme Court and the statutes of Ohio relative to payment of a docketing fee, he could not have the decision on the

2. It should be noted that in 1953, when the First District Court of Appeals of Ohio considered Burns' case on appeal and affirmed the lower court, a Notice of Appeal to the Supreme Court was duly filed in the Court of Appeals and served upon the prosecuting attorney of Hamilton County as required by law. Sec. 2953.06, Revised Code—App. A. p. 11). However the appeal was abandoned by not filing the notice in the Supreme Court. At that time Burns had self-retained counsel and presumably was not indigent. In the 1957 attempted appeal to the Supreme Court, the statute requiring service of the Notice of Appeal on the prosecuting attorney was not complied with.

3. It is significant that in *Griffin*, the opinion of Mr. Justice Black, the concurring opinion of Mr. Justice Frankfurter, and the dissenting opinions of Mr. Justice Burton and Mr. Justice Minton, concurred in by Mr. Justice Reed and Mr. Justice Harland, refer throughout to *an* appeal, not to successive appeals.

appeal which was afforded him further reviewed, if the court chose to review it, by the highest court of the state. *Griffin* was denied the *only* appellate review available to him under Illinois law. Burns had the appellate review afforded him but was not satisfied with the outcome because it was adverse.

On page 18 of petitioner's brief it is stated:

> "It should be pointed out also that there is no basis to conclude that an application for an appeal by petitioner could only be based on untenable or frivolous grounds. The Court of Appeals of Hamilton County, Ohio, noted that in its opinion there were reasonable grounds for the appeal to it. It seems wholly likely, therefore, that, if accorded the opportunity, the petitioner will be able to show good cause for an appeal to the Supreme Court of Ohio."

No such inference should be raised by the finding of the Court of Appeals that "there were reasonable grounds for the appeal." This is a *pro forma* finding to save the appellant from being assessed damages and a fee for the appellee's counsel, as provided in section 2505.35, Revised Code of Ohio. (Appendix A, p. 12). The last sentence of this section of the Code provides:

> "If the appellate court certifies in its judgment that there was reasonable cause for the appeal, neither such fee, additional interest, nor damages shall be taxed, adjudged, or awarded.

The Equal Protection of the Laws Provision of the Fourteenth Amendment Does not Apply.

Burns, the petitioner, was not singled out by the clerk of the Supreme Court of Ohio and made subject to a condition for the filing of his Motion for Leave to Appeal not imposed on others. The requirement that a filing fee of Twenty Dollars be paid upon the docketing of such motion applies to all.

The leveling of varying degrees of economically resourceful defendants to a common plane so that none will have an advantage over another in a court of law, desirable as it may be, is a practically unattainable social goal. It would involve, among other things, the furnishing, at public expense, to all defendants in a criminal prosecution who claim to be indigent:

(1) Publicly employed counsel of skill, competence and experience, equal to that of counsel available by private employment to all other citizens at all stages of a criminal proceeding, from arrest forward.

(2) Investigating agencies equal in competence to those available to the nonindigent accused.

(3) Public relations counselors to create a favorable trial climate for the indigent defendant equal in competence to those available through private employment by the most affluent defendants.

(4) All costs of appeals, including filing cost, preparation, printing and filing of briefs, fees of counsel, stenographic services, and other expense *ad infinitum*.

(5) Cost of bail bonds so as not to be handicapped in his consultation with counsel as compared with his nonindigent counterpart able to furnish bail.

(6) Cost of procuring, subsisting, and compensating defense witnesses, including professional experts.

CONCLUSION

(1) In *Griffin* it is said that the refusal to furnish a free transcript of the proceedings in the trial court to an indigent defendant, when such transcript is essential to an appeal is a denial of rights under the Fourteenth Amendment. We agree.

(2) In the case at bar, Burns, the petitioner, *was* furnished a transcript of the record in the trial court. On

the basis of this transcript he appealed. His conviction was affirmed on appeal. At this point all of his constitutional rights were exhausted, unless he wished to contest the decision on the appeal of his case by a *second* appeal in the Supreme Court of Ohio, by leave of that court, and upon the payment of a docketing fee of $20.00. He did not seek this appeal until four years later, and then without the payment of the required docketing fee. At that time he applied for leave to appeal *in forma pauperis*. He did not comply with the statute on appeal in that he did not serve notice on the prosecuting attorney of the county wherein he was convicted. Section 2953.06, Revised Code. (App. A, p. 14.)

His application to appeal from the judgment of the Ohio Appellate Court affirming the judgment of conviction by the trial court filed *in forma pauperis* four years later, after the *Griffin* decision, was rejected as not in conformity with the statutes of Ohio or the rules of practice of the court.

(3) The *Griffin* case does not apply because:

(a) Burns had an appellate review.

(b) Burns was furnished a transcript of the record in the trial court for such appellate review.

(c) Burns was not denied due process of law or equal protection of the laws since the law and court rule applicable to him is applicable to all those who have had an appellate review and wish consideration for further review.

On the basis of the argument herein presented, respondent respectfully prays that this court find the interpretation given by the Supreme Court of Ohio to Section 2503.17 of the Revised Code of Ohio, and Rules VII and XVII of its Rules of Practice, do not violate the due process or equal protection clauses of the Fourteenth

Amendment of the Constitution of the United States and therefore that the action of that court in refusing to consider the motion for leave to appeal until payment of the fee was within their constitutional power.

Respectfully submitted,

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APPENDIX A

Page's Ohio Revised Code Annotated (1954)—
Title XXIII (23)
Courts—Common Pleas
Chapter 2301: Organization

• • •

Sec. 2301.23. Transcripts of testimony furnished party if requested.

"When shorthand notes have been taken in a case as provided in section 2301.20 of the Revised Code, if the court, either party to the suit, or his attorney, requests transcripts of any portion of such notes in longhand, the shorthand reporter reporting the case shall make full and accurate transcripts thereof for the use of such court or party. The court may direct the official shorthand reporter to furnish to the court and parties copies of decisions rendered and charges delivered by the court in pending cases."

Sec. 2301.24. Compensation for making transcripts and copies.

"The compensation of shorthand reporters for making transcripts and copies as provided in section 2301.23 of the Revised Code shall not be more than fifteen cents per folio of one hundred words, to be fixed by the judges of the court of common pleas. Such compensation shall be paid forthwith by the party for whose benefit a transcript is made. The compensation for transcripts made in criminal cases, by request of the prosecuting attorney or the defendant, and transcripts ordered by the court in either civil or criminal cases, and copies of decisions and charges furnished by direction of the court shall be paid from the county treasury, and taxed and collected as other costs. The clerk of the court of common pleas shall certify the amount of such transcripts or copies, which certificate shall be a sufficient voucher to the county auditor, who shall forthwith draw his

warrants upon the county treasurer in favor of such shorthand reporters."

Sec. 2301.25. Costs of transcript.

"When ordered by the prosecuting attorney or the defendant in a criminal case, or when ordered by the court of common pleas for its own use, in either civil or criminal cases, the costs of transcripts mentioned in section 2301.23 of the Revised Code, shall be taxed as costs in the case, collected as other costs, and paid by the clerk of the court of common pleas, quarterly, into the county treasury, and credited to the general fund. When more than one transcript of the same testimony or proceedings is ordered at the same time by the same party, or by the court, the compensation for making such additional transcript shall be one half the compensation allowed for the first copy, and shall be paid for in the same manner. All such transcripts shall be taken and received as prima-facie evidence of their correctness. When the testimony of witnesses is taken before the grand jury by shorthand reporters, they shall receive for such transcripts as are ordered by the prosecuting attorney the same compensation per folio and be paid therefor in the same manner provided in this section and section 2301.24 of the Revised Code."

Title XXV (25)

Courts—Appellate

Chapter 2505: Procedure on Appeals

• • •

Sec. 2505.35. Damages on appeal on questions of law.

"In an appeal on questions of law, when the judgment or final order is affirmed, or when such appeal is dismissed for want of prosecution, as part of the costs in the case there may be taxed a reasonable fee of not more than twenty-five dollars, to be fixed by the court, for the counsel of the appellee. The court may grant damages to the appellee in any reasonable sum not exceeding two hundred dollars, unless the judgment or final order of the trial court directs the

payment of money and execution thereof was stayed on appeal in the appellate court. If such execution was stayed on appeal, in lieu of such damages, the judgment or final order shall bear additional interest, at a rate not exceeding five per cent per annum, for the time it was stayed, to be ascertained and awarded by the court. If the appellate court certifies in its judgment that there was reasonable cause for the appeal, neither such fee, additional interest, nor damages shall be taxed, adjudged, or awarded."

Title XXIX (29)

Crimes—Procedure

Chapter 2945: Trial

• • •

Sec. 2945.69. Appointment of attorney by trial judge.

"The trial judge may appoint some competent attorney to argue the bill of exceptions against the prosecuting attorney or the attorney general under section 2945.68 of the Revised Code, and such appointee shall receive for his services a fee of not more than one hundred dollars, to be fixed by the judge and paid out of the treasury of the county in which the bill was taken. Such attorney shall file his brief against the prosecuting attorney or the attorney general within ten days after service upon him of the brief in support of said exceptions. The hearing of such cases shall have precedence of other business and such cases shall be continued upon the docket of the court of appeals or the supreme court until argued and submitted."

Chapter 2953: Appeals

Sec. 2953.04. Proceedings to review.

"Judgments and final orders are reviewed by appeal, instituted by filing notice of appeal with the court rendering such judgment or order and with filing a copy thereof in the appellate court where leave to appeal must be obtained. Upon filing the notice of appeal there shall be filed in the appellate court the transcript and original papers as provided in

section 2953.03 of the Revised Code. It is not necessary to include in the transcript of the record any bill of exceptions or objections, but the original bill of exceptions or objections may be attached in lieu of the transcript of the record thereof. The court in which the review is sought, by summary process, may compel a more complete record to be furnished, and such original papers to be forwarded. The brief of the appellant shall be filed with the transcript and shall contain the assignments of error relied on in such appeal. Within fifteen days thereafter, the appellee shall file its brief. All of such proceedings to review such judgments have precedence over all other cases in said reviewing court, and shall stand for hearing on the trial docket of said court from day to day until heard and submitted. Special statutes regulating appeals in particular cases are not affected by this section."

Sec. 2953.05. Appeal filed.

"Appeal under section 2953.04 of the Revised Code, may be filed as a matter of right within thirty days after sentence and judgment. After thirty days from sentence and judgment, such appeal may be filed only by leave of the court or two of the judges thereof."

Sec. 2953.06. Notice of appeal served upon prosecuting attorney.

"Before the filing of a notice of appeal or a motion for leave where leave must first be obtained, a copy thereof must be served upon the prosecuting attorney. Notice of appeal shall contain a description of the judgment so as to identify it, and motions for leave to file shall state the time and place of hearing."

APPENDIX B

Smith-Hurd Illinois Annotated Statutes (1935):

Chapter 38—Criminal Code

Division XI—Writs of Error—New Trial

* * *

Sec. 780½. Appeals and writs of error—Jurisdiction of Supreme Court—Jurisdiction of Appellate Court.

"Appeals from and writs of error to Circuit Courts, the Superior Court of Cook County, the Criminal Court of Cook County, County Courts and City Courts in all criminal cases below the grade of felony shall be taken directly to the Appellate Court, and in all criminal cases above the grade of misdemeanor, shall be taken directly to the Supreme Court."

SUPREME COURT OF THE UNITED STATES

No. 581.—October Term, 1958.

William W. Burns, Petitioner, v. State of Ohio,	On Writ of Certiorari to the Supreme Court of Ohio.

[June 15, 1959.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The question presented in this case is whether a State may constitutionally require that an indigent defendant in a criminal case pay a filing fee before permitting him to file a motion for leave to appeal in one of its courts.

After a trial in Ohio in 1953, the petitioner was convicted of burglary and sentenced to life imprisonment.[1] That same year his conviction was affirmed without opinion by the Ohio Court of Appeals, which permitted petitioner to proceed *in forma pauperis* in that court and provided him with a free copy of the transcript. Petitioner immediately filed a notice of appeal in the Court of Appeals but did nothing further until 1957, when he sought to file a copy of the earlier notice of appeal and a motion for leave to appeal in the Supreme Court of Ohio.[2] To these papers petitioner attached an affidavit of poverty which declared that he was "without sufficient funds with which to pay the costs for Docket and Filing Fees in this cause of action." He also attached a motion for leave to proceed *in forma pauperis*.

[1] Petitioner was also convicted of larceny and sentenced to a term of seven years to be served concurrently with the burglary sentence.

[2] Despite the passage of years the appeal was timely. *State* v. *Grisafulli*, 135 Ohio St. 87, 19 N. E. 2d 645.

The Clerk of the Supreme Court of Ohio refused to file the papers. He returned them with the following letter:

"This will serve to acknowledge receipt of your motion for leave to proceed in forma pauperis, motion for leave to appeal and notice of appeal.

"We must advise that the Supreme Court has determined on numerous occasions that the docket fee, required by Section 1512 of the General Code of Ohio, and the Rules of Practice of the Supreme Court, takes precedence over any other statute which may allow a pauper's affidavit to be filed in lieu of a docket fee. For that reason we cannot honor your request.

"We are returning the above mentioned papers to you herewith." [3]

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[3] The Rules of Practice of the Supreme Court of Ohio obviously referred to in the clerk's letter are Rules VII and XVII.

§ 1512 (Rev. Code § 2503.17):

"The clerk of the supreme court shall charge and collect the following fees:

"(A) For each case entered upon the minute book, including original actions in said court, appeal proceedings filed as of right, . . . for each motion . . . for leave to file a notice of appeal in criminal cases . . . twenty dollars. . . .

"(B) For filing assignments of error . . . upon allowance of a motion for leave to appeal . . . five dollars. . . .

"Such fees must be paid to the clerk by the party invoking the action of the court, before the case or motion is docketed and shall be taxed as costs and recovered from the other party, if the party invoking the action succeeds, unless the court otherwise directs."

Rule VII:

"Section 1. *Felony Cases.* In felony cases, where leave to appeal is sought, a motion for leave to appeal shall be filed with the Clerk of this Court along with a copy of the notice of appeal which was filed in the Court of Appeals, upon payment of the docket fee required by Section 2503.17, Revised Code.

"Section 4. *Appeal as of Right.* In any criminal case, whether felony or misdemeanor, if the notice of appeal shows that the appeal

Under Art. IV, § 2, of the State Constitution, the Supreme Court of Ohio has appellate jurisdiction in many types of cases including those "involving questions arising under the constitution of the United States or of this state" and "cases of felony on leave first obtained." [4] Since burglary is a felony in Ohio,[5] the Supreme Court had jurisdiction to review petitioner's conviction and petitioner sought to file his motion asking leave to appeal.[6] The filing fee required by the Supreme Court on a motion for leave to appeal is $20 [7] and if that fee is paid, and the papers are otherwise proper, the motion will be considered with the possibility that leave to appeal will be granted.

We granted certiorari and leave to proceed *in forma pauperis*. 358 U. S. 919. Subsequently, an order was entered, 358 U. S. 943, expressly limiting the grant of

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involves a debatable question arising under the Constitution of the United States or of this state, the appeal may be docketed upon filing the transcript of the record and any original papers in the case, upon payment of the fee required by Section 2503.17, Revised Code."

Rule XVII:

"The Docket Fees fixed by Section 2503.17, Revised Code, must be paid in advance. . . ."

[4] See also Ohio Rev. Code §§ 2953.02, 2953.08, which implement this constitutional provision.

[5] See Ohio Rev. Code §§ 2907.09, 1.06, 1.05.

[6] In his notice of appeal filed in the Court of Appeals, petitioner stated "This appeal is on questions of law and is taken on condition that a motion for leave to appeal be allowed." But in the motion for leave to appeal to the Supreme Court, petitioner stated, among other contentions, that his conviction conflicted with his "Constitutional Guarantees of the Fourteenth Amendment (14) to the Constitution of the United States; and, Article I, Section 10 of the Constitution of the State of Ohio." This might indicate that petitioner was claiming an appeal as of right to the Supreme Court. However, since petitioner has consistently characterised his appeal as one which requires leave, we so consider it here.

[7] See n. 3, *supra*.

certiorari to the question posed by petitioner in his *pro se* petition which is restated at the outset of this opinion.[8]

The State's commendable frankness in this case has simplified the issues. It has acknowledged that the clerk's letter to petitioner is "in reality and in effect" the judgment of the Supreme Court. Only recently, that court had occasion to comment on the function of its clerk in these words:

> "It is the duty of the clerk of this court, in the absence of instruction from the court to the contrary, to accept for filing any paper presented to him, provided such paper is not scurrilous or obscene, is properly prepared and is accompanied by the requisite filing fee."[9]

In a companion case, the court observed that its clerk "acts as the court in carrying out its instructions."[10] The State represented that the clerk had been instructed not to docket any papers without fees and also that the Supreme Court had not deviated from its practice in this respect. Moreover, the State asserted that it was impossible for petitioner to file any action at all in the Supreme Court without paying the fee in advance. There is no showing that these instructions have been modified or rescinded in any way and the Supreme Court has sanctioned the clerk's well-publicized procedure of returning

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[8] As posed by petitioner, the question was

"Whether in a prosecution for Burglary, the Due Process Clause, And The Equal Protection Clause, of the Fourteenth (14) Amendment to the United States Constitution, are violated by the refusal of the Supreme Court of Ohio, to file the aforementioned legal proceedings, because Petitioner was unable to secure the costs."

[9] *State ex rel. Wanamaker* v. *Miller*, 164 Ohio St. 176, 177, 128 N. E. 2d 110.

[10] *State ex rel. Wanamaker* v. *Miller*, 164 Ohio St. 174, 175, 128 N. E. 2d 108, 109.

pauper's applications, without exception, with the above-quoted form letter. This delegation to the clerk of a matter involving no discretion clearly suffices to make the clerk's letter a final judgment of Ohio's highest court, as required by 28 U. S. C. § 1257.

Although the State admits that petitioner "in truth and in fact" is a pauper, it presses several arguments which it claims distinguish *Griffin* v. *Illinois*, 351 U. S. 12, and justify the Ohio practice. First, the State argues that petitioner received one appellate review of his conviction in Ohio with *in forma pauperis* benefits, while in *Griffin*, Illinois had left the defendant without any judicial review of his conviction. This is a distinction without a difference for, as *Griffin* holds, once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. 351 U. S., at 18, 22. This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency.

Since *Griffin* proceeded upon the assumption that review in the Illinois Supreme Court was a matter of right, 351 U. S., at 13, Ohio seeks to distinguish *Griffin* on the further ground that leave to appeal to the Supreme Court of Ohio is a matter of discretion. But this argument misses the crucial significance of *Griffin*. In Ohio, a defendant who is not indigent may have the Supreme Court consider on the merits his application for leave to appeal from a felony conviction. But as that court has interpreted § 1512 and its rules of practice, an indigent defendant is denied that opportunity. There is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other

defendants. Indigents must, therefore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio.

The State's action in this case in some ways is more final and disastrous from the defendant's point of view than was the *Griffin* situation. At least in *Griffin*, the defendant might have raised to the Supreme Court any claims that he had that were apparent on the bare record, though trial errors could not be raised. Here, the action of the State has completely barred the petitioner from obtaining any review at all in the Supreme Court of Ohio. The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law.

What was said in *Griffin*, might well be said here: "We are confident that the State will provide corrective rules to meet the problem which this case lays bare." 351 U. S., at 20.[11]

The judgment below is vacated and the cause is remanded to the Supreme Court of Ohio for further action not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART took no part in the consideration or decision of this case.

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[11] Shortly after this Court's decision in *Griffin* v. *Illinois*, *supra*, the Illinois Supreme Court promulgated Rule 65–1, which provides in part that any person sentenced to imprisonment who is "without financial means with which to obtain the transcript of the proceedings at his trial" will receive a transcript if it is "necessary to present fully the errors recited in the petition. . . ."

SUPREME COURT OF THE UNITED STATES

No. 581.—October Term, 1958.

William W. Burns, Petitioner, v. State of Ohio.	On Writ of Certiorari to the Supreme Court of Ohio.

[June 15, 1959.]

Mr. Justice Frankfurter, whom Mr. Justice Harlan joins, dissenting.

It is the special obligation of this Court strictly to observe the limits of its jurisdiction. No matter how tempting the appeal of a particular situation, we should not indulge in disregard of the bounds by which Congress has defined our power of appellate review. There will be time enough to enforce the constitutional right, if right it be, which the Court now finds the petitioner to possess when it is duly presented for judicial determination here, and there are ample modes open to the petitioner for assertion of such a claim in a way to require our adjudication.

The appellate power of this Court to review litigation originating in a state court can come into operation only if the judgment to be reviewed is the final judgment of the highest court of the State. That a judgment is the prerequisite for the appellate review of this Court is an ingredient of the constitutional requirement of the "Cases" or "Controversies" to which alone "The judicial Power shall extend." U. S. Const., Art. III, § 2. That it be a "final judgment" was made a prerequisite by the very Act which established this Court in 1789. Act of September 24, 1789, § 25, 1 Stat. 85, now 28 U. S. C. § 1257. "Close observance of this limitation upon the Court is not regard for a strangling technicality." *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 67. Such has been the unde-

viating constitutional, legislative and judicial command binding on this Court and respected by it without exception or qualification to this very day.

The requisites of such a final judgment are not met by what a state court may deem to be a case or judgment in the exercise of the state court's jurisdiction. See *Tyler* v. *Judges*, 179 U. S. 405; *Doremus* v. *Board of Education*, 342 U. S. 429. Nor can consent of the parties to the determination of a cause by this Court overleap the jurisdictional limitations which are part of this Court's being. Litigants cannot give this Court power which the Constitution and Congress have withheld. *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382. The President of the United States himself cannot secure from this Court determination of a legal question except when such a question duly arises in the course of adjudication of a case or controversy, even though he asks for needed help in a great national emergency. See President Washington's questions in 33 Writings of Washington (Fitzpatrick ed. 1940) 15–19, 28, and the correspondence between Secretary of State Thomas Jefferson and Chief Justice Jay, in 3 Correspondence and Public Papers of John Jay (Johnston ed. 1891) 486–489.

As the importance of the interrogator and the significance of the question confer no power upon this Court to render advisory opinions, a compassionate appeal cannot endow it with jurisdiction to review a judgment which is not final. One's sympathy, however deep, with petitioner's claim cannot dispense with the precondition of a final judgment for exercising our judicial power. If the history of this Court teaches one lesson as important as any, it is the regretful consequences of straying off the clear path of its jurisdiction to reach a desired result. This Court cannot justify a yielding to the temptation to cut corners in disregard of what the Constitution and Congress command. Burns has other paths to this

Court to assert what, forsooth, all of us may deem a failure by Ohio to accord him a constitutional right—other paths besides our indifference to the rules by which we are bound. Specifically, he has four obvious remedies for securing an ascertainment and enforcement of his constitutional claim by this Court without having this Court treat the letter of a clerk of a court as a court's judgment. For although the caption of the case would indicate that our review was of the Supreme Court of Ohio, in fact the review can only be of the refusal of the clerk of that court to docket petitioner's papers until a twenty-dollar docket fee was paid. The Supreme Court of Ohio was not asked to consider the appeal, nor did it itself refuse to do so. The decisions in *State ex rel. Dawson* v. *Roberts*, 165 Ohio St. 341, 135 N. E. 2d 409, and *State ex rel. Wanamaker* v. *Miller*, 164 Ohio St. 174 and 176, 128 N. E. 2d 108 and 110, mandamus denied *sub nom. Wanamaker* v. *Supreme Court of Ohio*, 350 U. S. 881, demonstrate conclusively that the Ohio court has retained the ultimate power to determine what papers will be permitted to be filed. There is not the remotest indication in the record that this petitioner's claim to file his appeal without paying the customary filing fee, because of indigence, was brought to the attention of the Ohio Supreme Court, nor is there any showing in the record that in writing his letter the clerk was acting at the specific behest of that court in this case.

(1) Petitioner may make a direct application addressed in terms to the judges of the Supreme Court of Ohio. Such applications informally expressed by way of letters are frequently addressed to this Court, and are accepted here as the basis for judgments by this Court. We are not to assume that an application so addressed to the judges of the Ohio Supreme Court will not be transmitted to that court and acted upon by it. This is not merely an appropriate assumption about the functioning of

courts. It is an assumption one can confidently make based upon the records in this Court. See *Wanamaker* v. *Supreme Court of Ohio, supra.* (Papers filed here in connection with the *Wanamaker* case make it clear that the Supreme Court of Ohio does consider letters asking that that court instruct its clerk to accept petitions for filing.) The Supreme Court of Ohio might well yield to this claim of Burns as other courts in like situations have yielded since *Griffin* v. *Illinois,* 351 U. S. 12. But in any event, a denial of Burns' application or refusal to entertain it would constitute a judgment of that court as an appropriate prerequisite for review here.

(2) Ever since § 13 of the Act of 1789, 1 Stat. 81, as amended, 28 U. S. C. § 1651, this Court has had power to issue mandamus in protection of its appellate jurisdiction in order to avoid frustration of it. This is an exercise of anticipatory review by bringing here directly a case which could be brought to this Court in due course.

(3) Under the Civil Rights Act, R. S. § 1979, 42 U. S. C. § 1983, Burns, like others before him who have allegedly been denied constitutional rights under color of any statute of a State, may have his constitutional rights determined and, incidentally, secure heavy damages for any denial of constitutional rights. See *Lane* v. *Wilson,* 307 U. S. 268.

(4) Burns' claim, in essence, is unlawful detention because of a denial of a constitutional right under the Fourteenth Amendment. That lays the foundation for a habeas corpus proceeding in the United States District Court. See *Johnson* v. *Zerbst,* 304 U. S. 458. To be sure, if the right he claims be recognized in habeas corpus proceedings, he would not be released as a matter of course but merely conditionally on the State Supreme Court's entertaining his petition for review as an indigent incapable of meeting court costs. The contingent nature

of the release would not impair the availability of habeas corpus. See *Chin Yow* v. *United States*, 208 U. S. 8.

Thus, it cannot be urged that necessity compels what the Constitution and statutes forbid—adjudication here of a claim which has not been rejected in a final judgment of a state court. Adherence to the dictates of the laws which govern our jurisdiction, though it may result in postponement of our determination of petitioner's rights, is the best assurance of the vindication of justice under law through the power of the courts. We should dismiss the writ of certiorari inasmuch as there has been no final judgment over which we have appellate power.